

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,)
)
) Petitioner,)
)
) v.) No. 21-404
)
WASHINGTON, ET AL.,)
)
) Respondents.)

Pages: 1 through 65

Place: Washington, D.C.

Date: April 18, 2022

HERITAGE REPORTING CORPORATION

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1220 L Street, N.W., Suite 206

Washington, D.C. 20005

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-404, United States versus Washington.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE PETITIONER

MR. STEWART: Thank you, Mr. Chief Justice, and may it please the Court:

First, this case is not moot. We acknowledge that Washington's recent enactment of SB 5890 makes it uncertain whether a decision invalidating HB 1723 will ultimately produce any financial benefit to the United States.

Under this Court's precedents, however, the case is not moot so long as there is a reasonable possibility that such a benefit will ensue. Respondents have not carried their heavy burden of negating that possibility.

Second, HB 1723 discriminates against the federal government and those with whom it deals. On its face, it is limited to a specific federal facility, and even within that facility, it applies only to workers engaged in the

1 performance of federal contractors -- contracts,
2 not to state or purely private workers.

3 Third, HB 3170 -- I'm sorry, 40 U.S.C.
4 3172(a) does not authorize that discriminatory
5 treatment. Properly understood, Section 3172(a)
6 authorizes Washington to apply evenhandedly to
7 federal facilities the same workers'
8 compensation laws that apply in other workplaces
9 in the state. It does not authorize Washington
10 to subject federal contractors at the Hanford
11 facility to uniquely onerous burdens.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Mr. Stewart, could
14 you give us a -- a -- a more fulsome explanation
15 of the financial interests of the United States
16 in the case considering -- in the context of the
17 mootness argument?

18 MR. STEWART: Well, before SB 5890 was
19 passed, there was no question that the United
20 States had a financial interest in the case.
21 That is, even though the financial burdens would
22 fall in the first instance on the federal
23 contractors, the United States has entered into
24 various arrangements whereby it would absorb
25 those costs. And, most significantly, it's

1 entered into a memorandum of understanding with
2 the -- the state agency whereby it would act as
3 a self-insurer and would pay any increased
4 workers' compensation costs attributable to most
5 of the federal contracts on the site.

6 And so the question for purposes of
7 mootness is whether the enactment of SB 5890 has
8 effectively divested the United States of that
9 financial interest, and the Respondents have
10 identified two possible reasons that that might
11 be so.

12 First, they've said SB 5890 covers all
13 of the workers who were previously covered by HB
14 1723 and some more as well, and, therefore, it
15 says, even if we were able to get the worker's
16 claim under HB 1723 declared invalid or set
17 aside, it wouldn't produce any financial benefit
18 for the United States because the worker could
19 all -- always re-file under SB 5890 and could
20 obtain the -- the same benefits on the same
21 terms.

22 We think it's not a natural
23 construction of the new statutory language to
24 say that the coverage would be coextensive in
25 that way. HB 1723 applied to all DOE Hanford

1 facility workers at specified but broadly
2 defined locations within the Hanford site,
3 without regard to the proximity of their work to
4 the actual storage or treatment of hazardous
5 waste.

6 And, by contrast, the crucial language
7 in SB 5890 is "structures and their lands" where
8 specified categories of waste are stored and
9 disposed of. And the -- the phrase "structures
10 and their lands" is not self-defining, but you
11 would imagine that the lands are areas outside
12 the structure that are in fairly close proximity
13 to the structure itself.

14 We've identified two types of
15 structures. One is a waste treatment facility
16 at the center of the site that is currently
17 under construction, meaning that waste will
18 ultimately be treated there, but that's not
19 happening yet. And that -- workers at that
20 facility would not naturally be said to be
21 working on structures and their lands where
22 wastes are being treated or disposed of.

23 The same thing applies to some of the
24 Hanford office workers, who worked in structures
25 where there no -- were no hazardous waste. So

1 we think that there's at least an open question
2 whether some of the workers who were covered by
3 HB 1723 would be covered by SB 5890.

4 The second mootness argument that the
5 state has made in its letter of last Monday was
6 that under the effective date provision of SB
7 5890, work -- that law will apply to all future
8 stages in any pending controversy about a
9 particular claimant's entitlement to benefits
10 under the law.

11 And so, for example, if a claimant was
12 denied benefits by DOE and then has an appeal
13 pending to the state industrial board,
14 Washington's view of the law now is that if the
15 claimant is not covered by -- even if the claim
16 was submitted before SB 90 was enacted, if the
17 claimant was covered by HB 1723 but not under
18 the new law, the claimant will not be entitled
19 to benefits because the new law will govern not
20 only new claims but additional stages in the
21 processing of an existing claim.

22 And it's possible that the Washington
23 courts will sustain that reading, but any
24 claimant who was covered by the prior law and
25 not by the new one can be expected to resist it.

1 And so we think that there's at least a
2 reasonable possibility that the -- the courts
3 would ultimately hold any claimant in that
4 position would be entitled to benefits if HB
5 1723 remains operative.

6 And so, to -- to summarize, it was
7 clear before the enactment of SB 5890 that the
8 United States would suffer harm, financial harm,
9 from this law, and the new developments that the
10 state have -- has pointed to don't eliminate
11 that possibility.

12 JUSTICE KAGAN: Do you think, if this
13 was the position you were in when you had to
14 make a decision to file for a petition for
15 certiorari, you would have filed?

16 MR. STEWART: If -- if they had
17 enacted the law between the time of the Ninth
18 Circuit's decision and the time when a petition
19 for certiorari had been due, we might not have
20 filed. We might have filed but asked simply
21 that the Court vacate the judgment below in
22 light of the -- the reduced practical effect of
23 the law even if we didn't think that the --

24 JUSTICE KAGAN: I guess -- I guess
25 that's what I'm asking. Isn't your real

1 interest here to vacate the judgment below, you
2 know, much more than whatever residual
3 possibility there are -- there is that these
4 claims will affect the government?

5 MR. STEWART: Well, we would certainly
6 like to have the judgment below vacated, and we
7 would also like for the Court to provide
8 affirmative clarification as to the scope of
9 3172(a). And, certainly, when -- when a case is
10 not technically moot, but the Court is deciding
11 is this a wise use of our resources to issue a
12 merits ruling, the Court would typically take
13 into account how likely is it that the legal
14 principles involved will bear on the resolution
15 of future cases. That's not a basis for finding
16 the case not to be moot, but if it isn't moot,
17 it's a basis for exercising the Court's
18 discretionary powers.

19 The second thing I would say is we
20 also have an interest and we think the Court has
21 an interest in avoiding the sorts of
22 post-certiorari maneuvers that it's referred to
23 in the past. That is, if the state, before a
24 cert petition was due, had amended the law in
25 the way that it has, it would have effectively

1 been giving up on the possibility of applying HB
2 1723 on into the future with its full coverage.

3 And the state was unwilling to make
4 that sacrifice at the time whether -- when it
5 was unclear whether this Court would grant
6 review. And so we think that there is an
7 interest in -- in terms of the Court's sound
8 management of its docket, again, if the case is
9 not moot, in issuing a decision on the merits so
10 that that sort of maneuver will be discouraged.

11 CHIEF JUSTICE ROBERTS: Mr. Stewart, I
12 have to say I'm -- I'm not quite sure I
13 understand how 3172 works. The question is
14 whether or not, if the state owned the
15 facilities, the -- the workers' compensation law
16 would still work the same way, right? That's
17 where the antidiscrimination principle comes in?

18 MR. STEWART: Yes.

19 CHIEF JUSTICE ROBERTS: Well, how does
20 that work? I mean, is there any doubt that if
21 the state owned these facilities that they would
22 apply the state workers' compensation rules to
23 those -- to the -- the workers?

24 MR. STEWART: Well, the -- the
25 language refers at the outset not to the state

1 legislature but to the state authority charged
2 with enforcing and requiring compliance with the
3 state workers' compensation laws, and, here,
4 that's Washington's Department of Labor &
5 Industries, which is referred to as L&I.

6 And then it says it can apply those
7 laws in the same way and to the same extent to
8 the federal -- to federal facilities as if the
9 premises were under the exclusive jurisdiction
10 of the state. And -- and with respect to HB
11 1723, the presumptions of workplace causation
12 that it adopts, these are not substantive rules
13 that L&I could apply to any other facilities
14 anywhere else within the State of Washington.

15 CHIEF JUSTICE ROBERTS: I'm sorry,
16 could you break that down? I -- I know that's
17 what it says, but I don't understand -- I don't
18 understand why, if there weren't a federal
19 facility here, but it was a state facility,
20 would those workers be covered by state workers'
21 compensation laws?

22 MR. STEWART: Yes, that's -- that's
23 correct, and the state could have adopted a law
24 that applied the HB 1723 presumptions throughout
25 the state. And if -- if the state had done

1 that, then 3172(a) would have authorized those
2 presumptions to be adopted at the federal
3 facility.

4 But the -- the impetus behind the
5 enactment of the statute was a decision of this
6 Court in Murray in 1934 which said because a
7 particular accident occurred on a federal
8 enclave and because the Federal Enclave Doctrine
9 said state laws enacted after the property was
10 ceded to the federal government can't be applied
11 to -- to the federal facility, the worker's
12 survivor was not able to obtain survivors
13 benefits under the generally applicable state
14 law.

15 And so what Congress decided to do was
16 to pass a law that said whatever you are doing
17 in the rest of the state you can do on the
18 federal facility. And the way that the Court in
19 Goodyear Atomic described it was to say, on its
20 face, 3172(a) allows the worker -- it dictates
21 the same treatment of workers at the federal
22 facility that they would receive on --

23 JUSTICE KAGAN: I guess, I mean --

24 CHIEF JUSTICE ROBERTS: I'm -- I'm
25 sorry, I was just going to say I didn't quite --

1 I mean, you talked about what the impetus of it
2 is, but if you look at the language, it says, I
3 mean, if this were a state facility, would the
4 workers there be subject to the state workers'
5 compensation laws?

6 MR. STEWART: I think you can do --
7 yes. I think that you can do the comparison in
8 either of two ways. You could ask if Hanford --
9 well, if Hanford were operated by the state,
10 then the state could do it.

11 But, if the question is what would the
12 state authority be able to do on other land
13 within Washington that was subject to the
14 exclusive jurisdiction of the state, the -- the
15 answer to that question would be no, nothing in
16 HB 1723 authorizes L&I to apply these
17 presumptions of workplace causation to land
18 anywhere else in Washington.

19 And to the extent that the language is
20 ambiguous, then reading it to --

21 CHIEF JUSTICE ROBERTS: You'll give me
22 at least that?

23 MR. STEWART: I would -- yes, I'll
24 give you that it's ambiguous. I -- I wouldn't
25 acknowledge that their -- the other side's

1 reading is as strong as ours because I think, if
2 you look at Goodyear Atomic, if you look at what
3 precipitated this, if you look at kind of the
4 distinctly disfavored nature of laws that
5 discriminate against the federal government, it
6 would really be a stretch to read this language
7 to say that even though Washington is not doing
8 this anywhere else in the state, it can do it at
9 the Hanford facility because it would be able to
10 do this if no question of intergovernmental
11 immunity were posed.

12 JUSTICE KAGAN: But --

13 JUSTICE ALITO: I had the same problem
14 as the Chief Justice, and I still don't
15 understand the answer. I don't understand what
16 the counterfactual is. Is -- this is the
17 closest I could come, but this is probably off
18 the mark, and you'll tell me why.

19 Imagine it's a state facility, it's
20 owned by the state, but there are federal
21 contractors working there. Is that the
22 situation we have to imagine?

23 MR. STEWART: No. I think, when --
24 when they talk about land under the exclusive
25 jurisdiction of the state and -- the Court in

1 Goodyear Atomic said, on its face, the federal
2 law requires the application of the same laws
3 that would apply to purely private facilities
4 within the same state, in that case, Ohio.

5 And so I think the relevant comparator
6 is not what if we were looking at the same tract
7 of land, the Hanford facility, but asking what
8 could the state do if this were under its own
9 exclusive jurisdiction. It's what rules could
10 L&I apply to other tracts of land in Washington
11 that are, in fact, within the exclusive
12 jurisdiction of the state.

13 And that's -- it's consistent with the
14 -- it may not be the only reading of the text,
15 but it's consistent with the impetus for
16 enactment of the law. It's consistent with the
17 nondiscrimination principle. It's consistent
18 with the Court's characterization of the effect
19 of 3172(a) in Goodyear Atomic.

20 JUSTICE KAGAN: But then, I mean --

21 JUSTICE BARRETT: Mister --

22 JUSTICE KAGAN: -- all your stronger
23 arguments, I think, are non-textual arguments.
24 I mean, Goodyear -- Goodyear is a -- is a
25 sentence in a case that was not about

1 discrimination at all, so I think I'm going to
2 put that to one side at least.

3 You have very strong arguments about
4 the impetus of the law and you have very strong
5 arguments about, if this were read as the state
6 wants it to be read, it would stretch quite
7 broadly and -- and -- and -- and maybe just
8 seems like not the kind of thing that Congress
9 would do.

10 But, if you look at the text here, I
11 mean, I'm sort of struggling to read it your
12 way. It -- it -- as the Chief Justice says, it
13 just says, if the state were in charge, could
14 the state do it, and, obviously, the state
15 could.

16 MR. STEWART: Well, again, the -- the
17 law is -- is not directed at the state
18 legislature. It doesn't talk about what the
19 state legislature could enact. It's addressed
20 to the state authority charged with enforcing
21 and requiring compliance.

22 And so L&I's authority is limited to
23 the enforcement of laws that actually exist, and
24 so, if you ask what could L&I do on premises
25 within the exclusive jurisdiction of the state,

1 if the point of reference is other places within
2 the State of Washington outside the Hanford
3 facility, it is -- it -- it could not apply
4 presumptions of this sort because there's no
5 state law that authorizes it to do so.

6 Even if you're talking about the
7 circumstances in which you had a hypothetical
8 Hanford facility that it was on the same tract
9 of land but did not use federal contract
10 workers, used exclusively state and private
11 workers, L&I couldn't in any meaningful sense
12 enforce the presumptions as they are set forth
13 in HB 1723 because HB 1723 by its terms refers
14 to DOE Hanford site workers.

15 Even within that site, it's limited to
16 the federal contract workers on that site.

17 JUSTICE ALITO: To what extent does
18 your argument depend on identifying it as a
19 federal facility?

20 Suppose -- excuse me -- there is one
21 facility in a state where the -- the risk is
22 much higher than anyplace else in the state,
23 and, therefore, there's a justification for
24 flipping the causation requirement. And it just
25 so happens that the only workers working on that

1 site are federal workers, so the site is not
2 identified as a federal facility by name. It's
3 identified based on the characteristics of the
4 site that are thought to justify the change in
5 the causation rule.

6 Would there be a problem there?

7 MR. STEWART: I think there would be a
8 potential problem, but it's a much harder case.
9 And one of the things we would like to know in
10 that circumstance is, did the state single out
11 that facility because it was a federal facility,
12 or did it single it out because it truly
13 believed that the risks there were higher than
14 anywhere else?

15 And so, for --

16 JUSTICE ALITO: Yeah, okay, so it's --
17 it comes down to a question of legislative
18 intent?

19 MR. STEWART: I think, again, in those
20 circumstances. For -- to -- to take another
21 hypothetical, if a state imposed a -- a special
22 tax, a higher corporate income tax on profits
23 that private firms earned -- earn by producing
24 and supplying military equipment.

25 Now a law like that might not refer

1 specifically to the federal government, but it
2 would have an evident likelihood of
3 discriminating against federal contractors
4 because military equipment is most likely to be
5 bought by the federal government.

6 Now, if a state legislature tweaked
7 the definition of military equipment to ensure
8 that it swept in a little bit of stuff that was
9 typically bought by civilians, that shouldn't be
10 good enough to save it. But -- but we
11 acknowledge that the law with respect to those
12 types of statutes is underdeveloped. They pose
13 much harder problems.

14 I think the reason that we have
15 pursued this case so vigorously is that it
16 seemed to us the easy case. It seemed to us a
17 case in which there were two forms of explicit
18 discrimination against the federal government.

19 JUSTICE BARRETT: Well, and --

20 MR. STEWART: What --

21 JUSTICE BARRETT: I'm sorry. Well,
22 this problem that Justice Alito is hypothesizing
23 and your answer goes to the potential problems
24 that you reserved in your breach -- brief with
25 respect to the new law, right?

1 MR. STEWART: Yes.

2 JUSTICE BARRETT: Because if you're
3 treating -- and it's not a question of
4 legislative intent, right? It's a question of
5 looking at the facial classification and saying
6 are the desk workers at this site subject to any
7 greater risk than, say, firefighters or miners?
8 And it's -- it's a question of identifying the
9 relevant categories of risk?

10 MR. STEWART: That -- that would be
11 important, but it might also turn on legislative
12 intent. For example, in -- in the equal
13 protection area, even where it is necessary that
14 a plaintiff show intentional discrimination, I
15 -- I was subject to adverse treatment because of
16 my race or sex, a plaintiff can sometimes make
17 that showing by establishing that the state
18 adopted a facial -- facially neutral criterion
19 but adopted it because it correlated with race
20 or sex.

21 And that, I think, is rarely
22 successful, but it is commonly understood to be
23 an available method of proof even in equal
24 protection cases where the plaintiff has to show
25 intentional discrimination.

1 So I think at least part of the
2 inquiry with respect to SB 5890 would be did the
3 state single out this particular category of
4 workers because it understood that the large
5 majority of them would be federal contract
6 workers, or did it enact the law because it was
7 concerned with the dangers imposed by these
8 occupations without regard to the identity of
9 the -- the entity that would ultimately bear the
10 financial loss.

11 JUSTICE SOTOMAYOR: Counsel, you have
12 a presumption in your favor, the presumption
13 that a waiver has to clearly and unambiguously
14 waive governmental immunity. As my colleagues
15 have pointed out, the language here is a waiver
16 of immunity, but there is some ambiguity as to
17 what the extent of that waiver is.

18 And so, given that your -- that your
19 opposing counsel points to a number of statutes
20 that very clearly say you can't discriminate
21 against the federal facility or federal
22 employees, they have very express language about
23 being treated equally, which this statute
24 doesn't, why doesn't that show us, if it's an
25 ambiguity as to the scope, that the scope is as

1 broad as the language supports?

2 MR. STEWART: Well, first, I think the
3 general rule -- and this is not just with
4 respect to intergovernmental immunity. It's --
5 applies to immunities from suit generally under
6 decisions like FAA versus Cooper. The general
7 rule is even when Congress has clearly
8 manifested its intention to waive immunity to
9 some degree, disputes about the scope of that
10 waiver are themselves subject to the clear
11 statement requirement.

12 The second thing is we do think that
13 Congress manifested an intent to import a
14 principle of nondiscrimination into the statute.
15 That is, it defined what the state agency can do
16 on federal facilities with respect to what -- by
17 -- by reference to what the state agency could
18 do on premises within the exclusive jurisdiction
19 of the state. And so we think it's natural to
20 say that was importing the nondiscrimination
21 requirement that has always been central to the
22 Court's intergovernmental immunity decisions.

23 The third thing I would say is we went
24 for 80 years after this statute was enacted
25 before any state appears to have read it to

1 authorize the -- the sort of targeting of
2 federal facilities that Washington has done
3 here. And so, if the law were truly ambiguous
4 or if the better reading of the law were as the
5 state represents, we would have expected states
6 to explore their options before that time.

7 The fourth --

8 CHIEF JUSTICE ROBERTS: Well, but, I
9 mean, maybe it has to do with the fact that
10 there aren't very many places like Hanford,
11 right, where you have a situation where
12 basically anybody there is certainly subject to
13 great concern, unlike other places.

14 I mean, is -- are there analogous
15 places in the rest of the country where a state
16 might be concerned about the workers'
17 compensation regime --

18 MR. STEWART: I mean --

19 CHIEF JUSTICE ROBERTS: -- because
20 it's a particularly hazardous environment that
21 -- that people have been working in?

22 MR. STEWART: -- I -- I don't know of
23 specific analogues to Hanford. Now Congress has
24 enacted a statute of its own, the EEOICPA, which
25 is not Hanford-specific, but it's specific to

1 workers in the atomic weapons sector. It -- it
2 encompasses people like the -- some of the
3 Hanford workers. It also encompasses people
4 engaged in uranium milling or mining. So there
5 certainly are other workplaces within the
6 country that -- where workers are subject to
7 some of the same dangers.

8 But the -- the whole point of the
9 antidiscrimination principle is that in
10 circumstances where it's apparent that the
11 federal government is going to be fitting the
12 bill, states may often feel a temptation to kind
13 of benefit some class of their own residents to
14 an exorbitant degree with the understanding that
15 they won't be -- the state itself won't be
16 required to absorb the costs.

17 The -- the last thing I would say
18 about Goodyear Atomic -- and I agree with you,
19 Justice Kagan, that the point at issue in that
20 case was not whether a discriminatory state law
21 would pass constitutional review. Nevertheless,
22 the fact that this was this Court's instinctive
23 reaction to what the language meant should tell
24 you that it's at least a plausible reading.

25 And I'd also point out that Congress

1 re-codified the provision with some minor
2 changes in the interval within -- between
3 Goodyear Atomic and the present, suggesting that
4 Congress was satisfied to read the statute as
5 imposing a non-discrimination requirement.

6 JUSTICE KAGAN: What -- what do you
7 think this statute would have to look like for
8 it to mean what the State of Washington says
9 this one means?

10 MR. STEWART: I mean, I think it would
11 have to say something like the state legislature
12 and/or the state authority can impose on
13 facility -- federal facilities or facilities
14 within the exclusive jurisdiction of the
15 government whatever workers' compensation laws
16 they choose, and to make doubly sure, it might
17 say without regard to principles of
18 intergovernmental immunity.

19 And I think that's another textual
20 point, that under the state's view of the law,
21 it -- it's really not clear what work the -- the
22 language about "in the same way and to the
23 extent" as if the premises were within the
24 exclusive jurisdiction --

25 JUSTICE KAGAN: I mean --

1 MR. STEWART: -- of the state to do
2 it.

3 JUSTICE KAGAN: -- when you said
4 especially, you know, to be double sure, it has
5 to refer to a waiver of immunity, I mean, do you
6 think that the statute basically, given the
7 breadth of this -- of -- of what's the State of
8 Washington is saying here, that there has to be
9 an express waiver of immunity?

10 MR. STEWART: Well, I think, with
11 regard to antidiscrimination in particular, that
12 is, it's relatively commonplace for the United
13 States to engage in the sort of waiver that we
14 think it engaged in here, namely, a -- an
15 authorization for the state to apply -- apply
16 certain of its own laws evenhandedly to federal
17 facilities, it -- it requires some express
18 congressional authorization, but it's not
19 especially unusual.

20 We don't know of any analogue to a
21 hypothetical version of 3172(a) that would tell
22 the state: You can impose discriminatory
23 workers' compensation laws on federal
24 facilities.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything?

3 Justice Breyer?

4 Justice Alito?

5 Justice Sotomayor, anything?

6 Justice --

7 JUSTICE BARRETT: I do have one.

8 Mr. Stewart, I just want to make sure
9 that I understand the textual hook because it's
10 been pointed out the statute's not a model of
11 clarity, but I guess, for one, I do see a
12 textual hook for your argument, and I want to be
13 sure that I'm correctly understanding it.

14 You say that 3172 is aimed at the
15 executive essentially, not at the legislature.
16 And you get that from this language that says
17 "state authority charged with enforcing and
18 requiring appliance -- compliance with," in the
19 beginning, and then "awards of the authority may
20 apply the laws of all land -- to all land and
21 premises in the state which the federal
22 government controls."

23 So yours isn't completely unmoored
24 from the statute and rooted in purposes, right?

25 MR. STEWART: Yes. I mean, I think --

1 I think what -- what it is saying is the state
2 authority here, L&I, can apply whatever
3 substantive body -- can apply to the federal
4 facility whatever substantive body of worker
5 compensation rules it could apply in the other
6 parts of Washington that are within the
7 exclusive jurisdiction of the state.

8 JUSTICE BARRETT: So the limitation --
9 so your position is that if there's an otherwise
10 existing extant body of generally applicable
11 law, the Washington agency charged with
12 enforcing that law can apply that extant body of
13 law to federal facilities and that that's what
14 3172 authorizes by that language that I just
15 quoted?

16 MR. STEWART: Yes. And the only
17 clarification I would make is, when we say
18 "extant," certainly, Washington could update its
19 state laws even after 3172(a) was enacted.

20 It's not like the Federal Enclave
21 Doctrine, where you look at a certain point in
22 time and you ask --

23 JUSTICE BARRETT: Right.

24 MR. STEWART: -- what state laws were
25 in effect there. But so long as it does that on

1 an even-handed basis, the Washington
2 administrative agency can apply to the federal
3 facility the same laws it is authorized to apply
4 in the rest of the state.

5 JUSTICE BARRETT: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MR. STEWART: Thank you, Mr. Chief
9 Justice.

10 CHIEF JUSTICE ROBERTS: Ms. Heintz.

11 ORAL ARGUMENT OF TERA M. HEINTZ

12 ON BEHALF OF THE RESPONDENTS

13 MS. HEINTZ: Mr. Chief Justice, and
14 may it please the Court:

15 To protect workers on federal projects
16 like the Hanford cleanup, Congress passed a
17 waiver statute that allows states to regulate
18 federal contractors using all the same tools we
19 can use as to any private actor.

20 That waiver allowed Washington's
21 former law that is challenged here. But,
22 ultimately, this Court need not decide this
23 issue because this case is moot.

24 The federal government is asking you
25 to issue a constitutional ruling invalidating a

1 state law that no longer exists and that has no
2 ongoing effect.

3 This Court should decline and should
4 instead vacate the decisions below and remand
5 for further proceedings.

6 The government concedes that there is
7 no prospective relief that this Court can grant
8 as to Washington's former law because the state
9 has already eliminated the provisions that are
10 challenged here.

11 The only reason the government argues
12 that there is still a live controversy is
13 because it assumes that invalidating
14 Washington's former law could still impact the
15 small number of pending claims that were
16 initially filed under the old law.

17 That is incorrect. Washington's
18 presumption statute applies retroactively, so
19 the revised law will govern any pending claims
20 for benefits initially filed under the former
21 law, even those cases on appeal.

22 The government speculates that there
23 may be individuals whose pending claims were
24 filed under the old law and that would not be
25 covered under Washington's revised statute. But

1 even if that were true, those claims would now
2 be rejected under Washington's revised statute.

3 Thus, if this Court were to reach the
4 merits and either uphold or invalidate
5 Washington's former law, it will have absolutely
6 no effect on any worker's right to benefits or
7 the government's finances. This case is moot.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Counsel, wouldn't
10 your case be much stronger if what you just said
11 had been found to be the case by the Supreme
12 Court of Washington?

13 MS. HEINTZ: Your Honor, what I did
14 say has been found at least in principle by the
15 Washington State Supreme Court.

16 JUSTICE THOMAS: No, I mean in the
17 context of the statutes that we're talking
18 about.

19 MS. HEINTZ: Certainly. If the
20 Supreme Court had issued a ruling directly on
21 point in this case, it would be stronger. But
22 what we're asking this Court to acknowledge is
23 settled principles of Washington and federal law
24 that when a statute is retroactive -- and the
25 statute here is expressly retroactive -- when it

1 is retroactive, then courts have an obligation
2 to the legislature or Congress to honor that
3 retroactive intent and to apply that law to all
4 pending cases, even if it ultimately changes the
5 outcome.

6 JUSTICE THOMAS: But do -- do you
7 think a -- a -- a -- someone who has benefitted
8 from the old law and who would like their
9 benefits updated for changed circumstances would
10 agree with you, or would they rather simply
11 pursue their case under the law -- under the old
12 law, which was the basis for their benefits in
13 the first -- in the first instance?

14 MS. HEINTZ: Your Honor, I have two
15 points.

16 First, a -- a worker that had
17 previously had a claim under the old law would
18 not have a vested right to fight a retroactive
19 application of the new law until there has been
20 a final judgment.

21 Once there's a final judgment, then
22 there's a due process right that is vested and
23 there can be an argument by the worker. But, as
24 to all pending claims, there is no such vested
25 right, and so there is no argument by the worker

1 that the law cannot retroactively apply to those
2 claims.

3 As to the closed claims -- and there's
4 about 160 of those claims -- approximately,
5 sorry, 140 of those claims -- those claims have
6 been adjudicated now to final judgment. The
7 federal government had every opportunity to
8 challenge the constitutionality of the old law
9 in those cases. It chose not to do so, and
10 those claims are now final.

11 So there is no ability by the federal
12 government to relitigate the constitutionality
13 of the old law in those cases. There is a small
14 exception under Washington law that allows a
15 worker to reopen only the amount of the benefits
16 or the need for additional medical services, but
17 that does not allow relitigation of the
18 determination that they suffered an occupational
19 injury.

20 Res judicata would still bar
21 relitigation and the federal government
22 challenging the underlying statute so that if
23 this Court issues a constitutional ruling, it
24 will have no impact either on the pending claims
25 or on the claims that are already closed, which

1 is a closed universe of only 200 claims total,
2 66 which are pending and approximately 140 that
3 are closed.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Well, I mean,
6 your argument depends upon a prediction about
7 what the Washington State Supreme Court is going
8 to do.

9 MS. HEINTZ: Yes, Your Honor, to some
10 extent, but this is settled law. We're not
11 asking you to accept our opinion on the issue.
12 The supreme -- state supreme court has been very
13 clear in Estate of Hambleton, and it follows
14 settled federal law on this issue that when
15 legislation is enacted and it is intended and
16 explicitly retroactive, the courts have an
17 obligation to the legislature to apply that law
18 retroactively.

19 CHIEF JUSTICE ROBERTS: Well, but we
20 have pretty rigorous standards when,
21 particularly after a grant of certiorari, the
22 respondent undertakes certain efforts to moot
23 out the case. It has to be -- I forget what our
24 language is -- you know, beyond any doubt or
25 something like that.

1 And I -- I think, as you just candidly
2 acknowledged, there are a number of cases where
3 the issue would still be alive, and however
4 confident you are about your prediction of your
5 state supreme court, you know, sometimes
6 predictions don't pan out. Courts do unusual
7 things.

8 MS. HEINTZ: Understood.

9 CHIEF JUSTICE ROBERTS: So isn't that
10 -- isn't that enough of a continuation of the
11 impact of the controversy given the rigorous
12 nature of our standards?

13 I mean, I -- I don't -- I don't want
14 to suggest that the legislature is engaging in
15 some kind of a gambit, but maybe it was a
16 sincere effort to make our workload better, but
17 it -- it -- it is not totally -- the case is not
18 totally out of, you know, any significance at
19 all, I don't think.

20 MS. HEINTZ: Your Honor, I would have
21 two responses.

22 First, I would just point out that
23 Washington's legislature is just a part-time
24 legislature. They only meet for a couple of
25 months each year. And so, since the last time

1 the legislature met and the legislation --
2 legislative session that started earlier this
3 year, there have been a number of significant
4 events that have crystallized and narrowed the
5 federal government's complaints -- claims. And
6 so the state legislature was responding in good
7 faith to those developments and -- and trying to
8 ensure the continuity of benefits.

9 But, as to your other question, Your
10 Honor -- my apologies, your other question was
11 about the state --

12 CHIEF JUSTICE ROBERTS: Don't expect
13 me to remember it.

14 (Laughter.)

15 MS. HEINTZ: When the state
16 legislature acts here or about the retroactive
17 application.

18 CHIEF JUSTICE ROBERTS: Right.

19 MS. HEINTZ: This is a much more
20 attenuated case than this Court considered in
21 the New York State Rifle Association.

22 Here, there is no claim of a live
23 controversy in the case-in-chief. The federal
24 government only sought an invalidation and a
25 declaratory judgment. They asserted no damages

1 here. They're not claiming they can assert
2 damages. So they're talking about potential
3 collateral consequences in other cases that are
4 based on a number -- a series of speculative
5 events that might occur in the future.

6 If a office worker tries to reopen
7 their case, if the Washington courts determine
8 that there is no -- that the statute -- the new
9 statute and the old statute are not coextensive,
10 if that office worker's claim falls within the
11 gap of the coverage, if Washington courts do not
12 apply res judicata to preclude relitigation of
13 their claims, then maybe there might be some
14 ongoing application.

15 But that is not the type of live case
16 or controversy and present controversy that this
17 Court has ever held as sufficient for Article
18 III purposes.

19 JUSTICE BARRETT: Counsel, if you say
20 it's so clear, I mean, I thought the government
21 made what I thought was a decent point in its
22 letter response. You didn't identify this
23 retroactivity argument until your fourth
24 submission regarding mootness. And if it was
25 that clear, why did you wait so long to make it?

1 MS. HEINTZ: Yes, Your Honor. And the
2 state sincerely regrets that and wishes that we
3 had raised that issue sooner.

4 To be clear, the state understood
5 immediately that this statute was retroactive.
6 What took a little longer to understand and
7 which we learned in the course of implementing
8 the law was that the state courts would apply
9 this retroactive legislation to all pending
10 claims on appeal, even if it means changing the
11 outcome of the litigation.

12 And that was an oversight, but there
13 is no uncertainty in the state of that law.
14 That is settled Washington law. It follows
15 settled federal law. There is no real ambiguity
16 about the application of that law.

17 JUSTICE KAGAN: Well, one of the
18 arguments you make in your briefing is that even
19 if we find that this does not raise to our very
20 high bar of mootness that we should vacate this
21 case. And I want to know whether you found any
22 precedent for us to do something like that at
23 this stage.

24 MS. HEINTZ: Well, Your Honor, there
25 is certainly precedent that the Court has broad

1 jurisdiction to -- to decide the issues that
2 sort of merit this Court's consideration. And I
3 think particularly where, as here, it would
4 require invalidating the laws of a sovereign
5 state, there are factors that would suggest that
6 this Court, even if it doesn't find it moot,
7 certainly finds that the stakes have been
8 substantially decreased, and it does not warrant
9 invalidating a state statute.

10 JUSTICE GORSUCH: I --

11 MS. HEINTZ: Part --

12 JUSTICE GORSUCH: -- I understand the
13 argument that we might dismiss the case if -- if
14 it's not moot but -- but for some reason no
15 longer of great significance. And I -- I think
16 that was your response to Justice Kagan.

17 But you're asking us to vacate a
18 judgment, and if it isn't moot and it isn't
19 wrong, on what authority could we do so?

20 MS. HEINTZ: Because that is what the
21 Court has done in the past when there's been a
22 change of the legislative scheme. That is the
23 reason that the case has been mooted out. So --

24 JUSTICE GORSUCH: Well, moot --
25 mootness, yes.

1 MS. HEINTZ: Yes. Oh --

2 JUSTICE GORSUCH: But I think Justice
3 Kagan's question -- and this is -- this is why
4 I'm -- I'm popping up -- is I think Justice
5 Kagan's question, if I understand it correctly,
6 is suppose it isn't moot. Suppose we have a
7 live controversy, small though it may be, some
8 still love it, all right, and suppose we think
9 the judgment below is correct.

10 How can we vacate it?

11 MS. HEINTZ: The Court would have -- I
12 don't know the -- the grounds on which this
13 Court would vacate it.

14 JUSTICE GORSUCH: Neither do I.
15 That's why I'm asking you.

16 (Laughter.)

17 MS. HEINTZ: Understood. Understood,
18 Your Honor.

19 JUSTICE GORSUCH: Okay. All right.
20 If you don't know the answer to that question,
21 good. That makes me feel better because I don't
22 either. All right.

23 MS. HEINTZ: Thank --

24 JUSTICE BREYER: Can I ask you, what
25 they say -- and, look, there are -- we assume

1 this new law sweeps back and avoids this
2 problem, okay? But they say there are 66
3 people, maybe there are a few more, a few less,
4 there's 66 people who worked at Hanford. They
5 sued under the own -- old law. They got
6 compensated under the Washington statute and
7 those are on appeal.

8 And you say do not worry because, as
9 to those 66 cases, this new law will come along,
10 and since it says it's retroactive, it will
11 apply to them too, and they'll follow that and
12 the thing will be wiped out.

13 All right. But they say: Read the
14 new law and read the old law. The old law
15 applies where there is -- what is it? It's --
16 it's -- it's geographically defined the area
17 where it applies, it's Hanford's decision,
18 geographic areas which collectively span
19 hundreds of miles. The new law applies to
20 workers who work at any structure and its lands.

21 So, when I read that, I think maybe
22 there are several federal workers who are busy
23 on a river at Hanford cleaning out muskrat nets
24 -- nests, okay, and they are nowhere near a
25 structure where particular forms of waste are

1 disposed of, expect -- except by the muskrats,
2 which have nothing to do with this, okay?

3 So they say: Well, how do we know
4 they're going to be wiped out? And you say:
5 Well, because there's clear Washington law on
6 that subject.

7 I would be willing to bet that there
8 isn't clear law on the geographical scope of
9 muskrat nets -- nests in the State of
10 Washington. So, when I read that, I thought: I
11 don't know. And, therefore, I couldn't.

12 Now that's my problem with your
13 argument, and if it's a real problem, well, then
14 I can't really say it's moot.

15 MS. HEINTZ: I understand, Your Honor,
16 and there are actually two separate mootness
17 arguments here. The much more straightforward
18 argument is that because this law applies
19 retroactively, whether or not the worker who has
20 a pending claim, whether they can continue to
21 assert that claim under the new law will be
22 determined solely by application of that new
23 law.

24 It requires no reference to the old
25 law at all. You just have to look at the

1 geographic scope of the new law. If they have a
2 claim --

3 JUSTICE BREYER: These claims they
4 already got. They were paid. And the
5 government wants its money back.

6 MS. HEINTZ: Yes, Your Honor, but the
7 retroactive application means that it says, oh,
8 the new law didn't -- the old law doesn't exist.
9 And so, if they have a claim under the new law,
10 they can proceed. If they don't, they -- they
11 can't.

12 JUSTICE BREYER: Oh, I get it. Okay.

13 MS. HEINTZ: Yeah.

14 JUSTICE BREYER: So your point is
15 Washington law is absolutely clear. This is the
16 situation, it said, retroactive in the new law.
17 So even if you won in 14 courts in -- because
18 they're stacked up there in Washington, and
19 you're now at the Court Number 13 and, yeah, you
20 won, you won, you won, you won, bad luck, the
21 government's going to come in and we will say in
22 -- the government will say only the new law
23 applies, so it doesn't matter whether you're
24 working on muskrat nests or any -- either you
25 were or you weren't. And if you were, then bad

1 luck. And if you weren't -- okay.

2 MS. HEINTZ: Exactly.

3 JUSTICE BREYER: And the authority for
4 that under Washington law is?

5 MS. HEINTZ: Estate of Hambleton,
6 which follows the Pluet case.

7 JUSTICE BREYER: Okay. Look at --

8 MS. HEINTZ: And that is settled law,
9 and it's settled in multiple different cases.

10 JUSTICE BREYER: Got it.

11 MS. HEINTZ: So these are two separate
12 mootness arguments.

13 JUSTICE ALITO: I -- I appreciate your
14 concern that we not exceed our Article III
15 jurisdiction and decide something that's not a
16 live case or controversy. But, other than that
17 abstract concern, why do you care? If this old
18 law is void, dead, has no effect, why are you
19 fighting so hard to prevent us from considering
20 its status?

21 MS. HEINTZ: Your Honor, I mean, the
22 state has an interest in ensuring that this
23 Court address live cases or controversies. And
24 -- and we do still believe that the way -- the
25 old law fell within the scope of the waiver.

1 It's just no longer a live case or controversy.

2 But, as acknowledged, the waiver
3 language is very broad. It uses the term
4 "exclusive jurisdiction of the state." That
5 language does not really permit distinguishing
6 between different types of intergovernmental
7 immunity, as -- as would be suggested by the
8 government.

9 JUSTICE ALITO: Well, do you think it
10 allows -- it allows a state to single out a
11 federal facility by name?

12 MS. HEINTZ: Your Honor, it could do
13 that -- if the state could do that with respect
14 to a private actor, which we think the state
15 could, then it is permitted by -- under this
16 waiver provision.

17 And I would just note that at the time
18 that this waiver statute was initially passed in
19 1936, states had already adopted workers'
20 compensation schemes that chose -- that treated
21 different employers differently based on their
22 circumstances.

23 JUSTICE ALITO: Well, the state could
24 single out a private facility, and that -- the
25 only -- what would be the defense against that?

1 A rational basis -- equal protection review.
2 That's it. So, basically, you think that this
3 means nothing.

4 MS. HEINTZ: I think that this waiver
5 permits differential treatment of the federal
6 government because it permits everything that
7 the state could do with respect to a private
8 actor.

9 JUSTICE KAGAN: And it could do that
10 --

11 CHIEF JUSTICE ROBERTS: Why --

12 JUSTICE KAGAN: -- with respect to
13 federal employees, yes, not just employees of
14 contractors?

15 MS. HEINTZ: No, Your Honor. The
16 federal employees are governed by a separate
17 federal statute, the Federal Employee
18 Compensation Act, which has a preemption
19 provision. So this statute, even from the time
20 it was first passed, only ever applied to
21 federal contractors, which are private
22 employers. And so Congress understood that at
23 the time --

24 JUSTICE KAGAN: Well, but if you look
25 at the language of this statute and if you take

1 it to be as broad as you say the language is,
2 why wouldn't -- why would preemption principles
3 apply?

4 MS. HEINTZ: Your Honor, because -- I
5 have two responses, but, first, preemption
6 applies even under the state's exclusive
7 jurisdiction. So what you're looking at is what
8 the state could do with respect to a private
9 actor on state land.

10 Even in those situations, the state
11 cannot conflict with federal law. It is still
12 bound to ensure that it doesn't interfere or
13 conflict with federal law. It would similarly
14 -- those preemption principles would apply under
15 this.

16 And so, as this Court recognized in
17 North Dakota v. United States, preemption and
18 intergovernmental immunity are two separate
19 obstacles or barriers to state limit --
20 regulation of federal contractors.

21 JUSTICE BARRETT: I don't understand
22 where it is that the state has exclusive state
23 jurisdiction. Maybe I'm just being dense about
24 this, but it seems to me like the Supremacy
25 Clause stretches everywhere.

1 So you just said in response to
2 Justice Kagan that preemption wouldn't apply if
3 it was the state's exclusive jurisdiction.
4 Wouldn't that presuppose that Congress had
5 already waived some sort of immunity or already
6 said we just cede our authority over this
7 particular piece of territory to the state?

8 MS. HEINTZ: Your Honor, preemption
9 principles would apply. So this does not waive
10 preemption. This waives only intergovernmental
11 immunity and territorial jurisdiction, and those
12 are incidents of federal jurisdiction.

13 But even in the state's exclusive
14 jurisdiction, when it's regulating a private
15 actor on state land, it is still bound to comply
16 with other federal statutes. So --

17 JUSTICE BARRETT: But the state
18 doesn't have exclusive jurisdiction, right,
19 except insofar as Congress may allow it to?

20 MS. HEINTZ: Right, Your Honor, and so
21 the "exclusive jurisdiction of the state," that
22 term is reference to a virtual control that
23 generally occurs with state regulation of
24 private actors on state land.

25 There is still, like, constitutional

1 limitations and limitations of federal statutes
2 that apply in those situations, but territorial
3 limitations and limitations of intergovernmental
4 immunity would not apply.

5 JUSTICE BREYER: Well, how could --

6 JUSTICE BARRETT: But you're saying
7 that this would be so -- that -- that -- that
8 the federal government was so deferential to the
9 states here that if we read the waiver as you
10 propose, Congress is essentially saying to the
11 states you can impose whatever rules of workers'
12 compensation liability you want.

13 So, here, you could say it was strict
14 -- strict liability because this was a really
15 hazardous site, and so, if there's any kind of
16 injury suffered by a federal contractor on this
17 site, you know, there might be an award of a
18 million dollars, that would be fine.

19 MS. HEINTZ: It would depend on if the
20 state could do that with a private regulator.

21 JUSTICE BARRETT: Let's say it could.

22 MS. HEINTZ: Yes. So, in that
23 circumstance, this doctrine would not provide a
24 limitation. If there was a conflict with some
25 other federal statute -- and there are often

1 federal statutes at play when you're talking
2 about significant federal functions or federal
3 enclaves. There's all kinds of statutes that
4 would be at play.

5 If there was a conflict with one of
6 those federal statutes, then that would still be
7 a limitation. But intergovernmental immunity
8 would not be that limitation. And Congress was
9 just making the determination that states could
10 use the full authority that they have over any
11 private or -- or state actor or employee and
12 apply the same rules that they would apply in
13 those circumstances --

14 JUSTICE BREYER: But there is a
15 different --

16 MS. HEINTZ: -- to the private --

17 JUSTICE BREYER: -- I mean, that is
18 exactly the question that is bothering me. I
19 mean, one day in the legislature a group of
20 federal employees from Hanford show up and they
21 say: You know, it's tough being a federal
22 employee. People in the state make much more
23 money. We have more dangerous jobs. And the
24 state laws generally are pretty fair to their
25 workers, but try working for the federal

1 government. This is supposed to strike a chord
2 of agreement.

3 So they say: Now you can't do much
4 for us because you're a state legislature, but
5 I'll tell you one thing you can do. What you
6 could do for us is you give us, if we're hurt,
7 and define hurt very broadly, please, so that if
8 we're even hurt a little bit, we get millions.

9 Now we've got to watch that number
10 because -- but -- but, really, it's high. And
11 you know the wonderful thing? If you make
12 private employers pay this in the State of
13 Washington, they are voters, so you have to
14 worry about them.

15 And if the government pays for it in
16 the state, well, that's a problem, you're going
17 to have to raise taxes. But do you know who's
18 paying for this one? The feds. The feds will
19 pay, the taxpayers in the other states. So
20 let's go and really hit the ceiling and we'll
21 really pay a lot of money and we won't have to
22 pay for it.

23 Okay. I know projects like that. I
24 won't say which they are, but there we are.

25 Now, to me, did I think Congress

1 intended that? Hmm. It's going to take quite a
2 lot of doing before I think they wanted that
3 result. Now that's -- that's where I am. So
4 what do you think?

5 MS. HEINTZ: Understood, Your Honor.
6 Congress has the ultimate political check here.
7 They can always amend this statute, but they
8 used very broad language. They used the term
9 "exclusive jurisdiction of the state."

10 They knew it was very broad language.
11 That exact term was used in Merrick v. Garland
12 -- Garrick, so the case that they were
13 responding to used exactly that same type of
14 language. They understood that they were
15 granting a broad authority.

16 If they don't like the policy later,
17 they can amend the statute. But that is not a
18 basis to ignore the plain terms of this
19 language, which allows the state to treat the
20 premises as if it were under the exclusive
21 jurisdiction of the state.

22 JUSTICE KAGAN: Ms. Heintz, I think
23 the question was really a question of, like, you
24 know, maybe you're right about the text, but why
25 would Congress have done that? I mean, we can't

1 really believe that that's what Congress meant
2 to do.

3 And if you take all the other statutes
4 which you gave us and you said, look, the text
5 is different, and you're right, the text is
6 different.

7 But, at the same time, we know that
8 Congress has a kind of modus operandi with
9 respect to this, and it basically always says
10 whatever you do elsewhere you can do to -- for
11 facilities like Hanford.

12 It doesn't say, you know, whatever you
13 could dream of doing elsewhere but actually
14 wouldn't you could do to federal facilities.
15 And I think that that's what Justice Breyer is
16 asking. Like, what sensible Congress would have
17 written the statute the way you say it ought to
18 be read?

19 MS. HEINTZ: Well, there number -- are
20 a number of points, Your Honor. They were
21 regulating primarily private employers, and so
22 they could have reasonably assumed that those
23 private employers who act as federal contractors
24 did have some say in the legislative process,
25 which is evident here too. The -- the federal

1 contractors did participate in the state
2 legislative process.

3 And, second, Congress could very well
4 conclude that the type of workers' compensation
5 schemes that had already been enacted by the
6 states, which allows distinguishing between
7 different employers based on the specific risks
8 of that employer, based on their specific safety
9 profiles, based on all of the distinctive
10 features of that employer, that that should
11 apply with as much force to these private
12 entities that were governed by this waiver.

13 And -- and that's a very reasonable
14 decision. Maybe Congress did not anticipate
15 that it would be taken this far, but we're not
16 really doing anything differently than what was
17 permitted before in that Hanford is a unique
18 site. It is the most toxic workplace in
19 America.

20 There -- you know, the employees there
21 are around 56 million gallons of toxic and
22 radiological hazard waste and they have unique
23 exposures. And -- and another thing is that
24 they can't always prove what they were exposed
25 to, and that's one of the other unique dangers

1 here.

2 And so Congress could very well have
3 concluded that the federal contractors, these
4 private employees -- employers could take care
5 of themselves and that there was every reason to
6 allow states to regulate these private employers
7 based on their specific circumstances.

8 JUSTICE BARRETT: Ms. Heintz, what do
9 you have to say to the government's language or
10 focus on the language that makes it seem like
11 this is aimed not at the legislature -- and by
12 "it," I mean 3172 -- is aimed not at state
13 legislatures but at the state bodies who enforce
14 otherwise generally applicable laws?

15 MS. HEINTZ: So the argument is --
16 seems primarily directed towards the word
17 "apply." And I think that argument --

18 JUSTICE BARRETT: Well, I think
19 enforcing and requiring compliance was too,
20 right?

21 MS. HEINTZ: Yes. But the -- that
22 language presupposes there's a statute that's
23 already been enacted. And the federal
24 government doesn't argue that this language
25 freezes the laws in place as of 1936, which

1 would be the consequence, I think, of not
2 permitting states to enact new laws.

3 JUSTICE BARRETT: I guess I don't
4 understand why that position would freeze the
5 law. I agree with you, and -- and the
6 government, Mr. Stewart, said that that's not
7 their position, and I don't see how it could be.

8 But, if the statute is aimed at "the
9 state authority charged with enforcing and
10 requiring compliance with," that description
11 seems to fit, you know, the executive agency.

12 MS. HEINTZ: Because, at the time that
13 this law was enacted, there was a broad
14 prohibition on any form of regulation of the
15 federal government or those with which it dealt.

16 And so, if Congress intended at that
17 time for this language to prohibit state
18 legislators from doing anything, then they --
19 then this would have very little meaning. It
20 would only have applied to the laws that were
21 existing at the time. It could --

22 JUSTICE BARRETT: So "apply," then
23 address what you were getting ready to say about
24 the word "apply."

25 MS. HEINTZ: That the word "apply"

1 really does presuppose that there's been an
2 enactment -- and -- of a law. And so what you
3 really need to do is see what kind of law can --
4 can the states enact and then apply.

5 And, really, there's no -- the word --
6 term "exclusive jurisdiction" does not allow for
7 a distinction between different types of
8 intergovernmental immunity.

9 This Court in *Goodyear* has already
10 held that this is a waiver of intergovernmental
11 immunity. It's a clear and unambiguous waiver
12 at least as with respect to direct regulation.

13 And this language really doesn't allow
14 you to distinguish between these different
15 types. If the state can directly regulate under
16 its exclusive jurisdiction, it can also, you
17 know, remove all other incidents of federal
18 jurisdiction, including all of intergovernmental
19 immunity.

20 JUSTICE GORSUCH: I just want to make
21 sure I understand your mootness argument. Sorry
22 to circle back.

23 But your first point as I take it is
24 that in this case, the government only sought a
25 declaratory judgment and injunction, and there's

1 nothing to declare and there's nothing to enjoin
2 because the statute's gone, point one.

3 MS. HEINTZ: Yes.

4 JUSTICE GORSUCH: Point two, with
5 respect to the ongoing other cases, you're
6 confident you're representing to the Court that
7 Washington state courts will retroactively apply
8 the new law and not the old law?

9 MS. HEINTZ: Yes, Your Honor.

10 JUSTICE GORSUCH: Okay. And, number
11 three, if you're wrong about that, the
12 government can raise its arguments there?

13 MS. HEINTZ: Yes, Your Honor.

14 JUSTICE GORSUCH: And number four,
15 that with the closed cases, they're just closed
16 and the government lost its chance to make those
17 arguments because they're final judgments?

18 MS. HEINTZ: Yes, Your Honor.

19 JUSTICE GORSUCH: All right. I got
20 it. Thank you.

21 MS. HEINTZ: Thank you.

22 JUSTICE KAGAN: Do you think there's
23 any way of certifying this issue to the
24 Washington Supreme Court about what they will
25 do?

1 MS. HEINTZ: I understand that that
2 has happened before in the past. It -- it --
3 it's been a long time, but I -- I believe there
4 is a -- a procedure available to do that, yes.

5 I don't think it's necessary. The
6 state law is very clear on this point. The
7 federal government is not really challenging
8 that law. They're not challenging the actual
9 language of the statute, which applies
10 retroactively.

11 They're raising sort of an inchoate
12 uncertainty, but that isn't sufficient, I think,
13 in an -- to present a live case or controversy,
14 particularly when that alleged uncertainty deals
15 with a collateral case, not this case-in-chief.

16 Here, there is no ongoing violation.
17 There are no damages. And so, in this case,
18 there is no reasonable likelihood of an ongoing
19 effect.

20 JUSTICE ALITO: But what if your
21 prediction turns out to be wrong?

22 MS. HEINTZ: Then the federal
23 government can raise that issue in the cases,
24 the 66 live cases.

25 JUSTICE ALITO: Yeah. And then what?

1 MS. HEINTZ: And then -- and then the
2 arguments will be made. But, in that context,
3 the state will also be arguing, as would the
4 federal government, this does apply
5 retroactively.

6 JUSTICE ALITO: Well, no, play it all
7 out. So they raise it, and the state court says
8 no, the prediction was wrong. Then what?

9 MS. HEINTZ: The -- then it would --
10 at least at that point, you will know there's a
11 live case or controversy.

12 JUSTICE ALITO: Yeah. And then what?
13 They have to file a new cert petition?

14 MS. HEINTZ: If the state courts
15 decide similarly, given the history in this
16 case. It could happen. But I think there is no
17 reasonable likelihood of that happening, that
18 these -- these -- again, multiple levels of
19 speculation that are built in, because even in
20 the context where there's no retroactive
21 application, we still have our argument that the
22 statutes are coextensive.

23 And even if the courts reject that,
24 that particular worker's claim needs to fall in
25 the gap of that coverage. We're talking a

1 closed universe of a very small number of
2 claims. So there are multiple layers in which
3 this gets resolved based on state law grounds
4 that never have to reach the invalidity of the
5 underlying statute.

6 And so, given all of that layer of
7 speculation, it really isn't sufficient to
8 establish a live case or controversy in this
9 case.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas?

13 Justice Breyer, anything further?

14 Justice Alito, anything?

15 Justice Gorsuch? Nothing?

16 Thank you, counsel.

17 MS. HEINTZ: Thank you.

18 CHIEF JUSTICE ROBERTS: Rebuttal,
19 Mr. Stewart?

20 REBUTTAL ARGUMENT OF MALCOLM L. STEWART
21 ON BEHALF OF THE PETITIONER

22 MR. STEWART: Thank you, Mr. Chief
23 Justice.

24 First, Respondents have said -- have
25 characterized our challenge as focusing on the

1 potential collateral consequences of HB 1723.
2 But, when we sought declaratory and injunctive
3 relief at the outset against enforcement and
4 application of HB 1723, that is a law that is
5 applied and enforced in the context of
6 individual benefits determinations.

7 And so the very thing we were asking
8 for was an order saying don't apply and enforce
9 these unique standards in determining individual
10 claimants' entitlement to benefits. And our
11 position is there is still a sufficient
12 possibility that this will wind up happening,
13 that the case is not moot.

14 The second thing is that, Justice
15 Kagan, you referred to the possibility of
16 certification. And, certainly, there is a
17 process by which this Court can certify state
18 law questions to the -- the state supreme court.
19 It -- it's often done when the Court feels that
20 it needs to know what state law dictates before
21 it can resolve the federal question.

22 I've never known of it being done to
23 inform the Court's determination whether a case
24 is moot, and I think that's partly because cases
25 like Mission Products really set the -- the

1 applicable framework. Mission Products says the
2 very existence of substantial uncertainty is a
3 basis for finding the Court not to be moot. It
4 is often the case that when the Court grants
5 cert on -- on a precise question, the ultimate
6 practical consequences of its ruling are not
7 clear because those depend on subsequent
8 determinations as to other questions. That
9 doesn't make the case moot.

10 The third thing, Justice Gorsuch, you
11 asked about what would the authority be to
12 vacate. We -- we think that the Court has
13 recognized a -- a broad authority to vacate
14 based on the principles of equity. Often, when
15 the Court has vacated judgments below, it's done
16 so in summary orders, and, therefore, the -- the
17 legal principles have not been fleshed out as
18 much as they could be.

19 But we would also say, if there is
20 doubt about the Court's authority to vacate, the
21 Court certainly shouldn't leave the judgment
22 intact. It would really create dismal
23 incentives to tell a state that if you can
24 reduce the practical significance of the
25 question presented enough for the Court to DIG

1 but not enough for the court case to be moot,
2 you can preserve your favorable judgment.

3 The fourth thing, just as a point of
4 clarification, Justice Kagan, you asked about
5 federal employees. Section 3172(c) says that
6 the authorization doesn't disturb Section 8101
7 of Title 5, and that's the Federal Employees'
8 Compensation Act. It's apparent on the face of
9 3172 that this doesn't affect federal employees.
10 It affects only federal contract workers.

11 But the reason that the Court has
12 always framed the antidiscrimination principle
13 as no discrimination against the federal
14 government or those with whom it deals is that
15 it's often predictable that when there is
16 discrimination against federal contractors, the
17 costs of that discrimination will ultimately be
18 borne by the United States.

19 And the last thing, in response to
20 Justice Breyer's question, our complaint here is
21 not that Washington is treated the -- treating
22 the workers too generously. If Washington
23 wanted to spend its own funds to benefit a class
24 of Washington residents that it believed had not
25 been treated as well as they should have by the

1 federal government, its authority to spend state
2 treasury funds wouldn't be impacted by
3 principles of intergovernmental immunity.

4 The problem here is that Washington
5 has decided that the United States should be
6 doing more for this class of Washington
7 residents, but it's not within the power of a
8 single state to determine how much the federal
9 government should be doing to solve a national
10 problem.

11 Thank you, Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 11:03 a.m., the case
15 was submitted.)

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